

APPEAL NO. 032478
FILED OCTOBER 29, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 18, 2003. The hearing officer determined that the appellant (claimant herein) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals on factual sufficiency grounds, and requests that the Appeals Panel order the respondent (carrier herein) to perform an MRI and a knee surgeon to do a comparison analysis. The claimant requests that a new hearing be ordered to consider the results of the new MRI and the opinion of the knee surgeon. Finally, the claimant asserts that the hearing officer asked his attorney to speak up a number of times during the hearing preventing the attorney from effectively presenting the claimant's case. The carrier contends that the claimant's appeal is untimely, that the claimant improperly relies upon an alleged agreement at the benefit review conference, which it denies existed and which was not in evidence at the CCH, and that the decision of the hearing officer was supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Since it is jurisdictional, we first address the question of the timeliness of the claimant's appeal. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed to the claimant on August 22, 2003. Pursuant to Section 410.202(a), a written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 143.3(c) (Rule 143.3(c)) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(c) must be satisfied in order for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 002806, decided January 17, 2001.

The claimant does not state in his request for review the date he received the hearing officer's decision. We note that pursuant to Rule 102.5(d) he was presumed to have received the decision five days after it was mailed or on August 27, 2003. The claimant mailed his request for review to the Commission which was postmarked September 17, 2003, and the Commission received it on September 19, 2003. Thus, since he mailed his request for review to the Commission within 15 days and it was received within 20 days of the date the claimant was deemed to have received the hearing officer's decision, the claimant's request for review is timely. See Section 410.202(a); Rule 143.3(c).

On appeal the claimant raises a number of matters that were not raised at the CCH. The claimant asserts that the hearing officer interrupted his attorney some "twenty times or better" to ask him to speak up, disrupting the presentation of the claimant's case. We find only two instances in the record where the hearing officer requested the claimant's attorney to speak up and no objection to the hearing officer's doing so. Absent an objection, we find no error was preserved at the CCH for our review concerning this matter.

The claimant also requests on appeal that we enforce an agreement that he contends the carrier made at the second benefit review conference (BRC) to pay for a new MRI and to permit him to select a doctor to compare the new MRI with the one performed previously. This matter was not brought up at the CCH and there is no BRC agreement in evidence. Again, absent development of this matter at the CCH, we cannot consider it on appeal.

What we can consider on appeal is the claimant's contention that the hearing officer's determinations regarding injury and disability were not sufficiently supported by the evidence. There was conflicting evidence presented on the disputed issues of injury and disability. The issues of injury and disability are questions of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no basis to reverse the hearing officer's resolution of the injury or disability issues.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **SERVICE LLOYDS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**JOSEPH KELLEY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HIGHWAY NORTH
AUSTIN, TEXAS 78755.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge